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Supreme Court, U.S.
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In The

Supreme Court of the United States

DANNY MAIDEN,

Petitioner,

versus

NORTH AMERICAN STAINLESS, Limited Partnership

and

STEVE SHAVER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does Kentucky (and American) tort law recognize a theory of "corporate wrongs" whereby *only* business employers, and not their individual employees, are liable for the wrongful conduct of their individual employees?

May a federal district court accept diversity jurisdiction over a case under 28 United States Code §1441(b) by characterizing an individual non-diverse party-defendant as "fraudulently joined" under the "corporate wrongs" theory described above?

Are pleaders entitled to rely upon rule 8 of the federal rules of civil procedure and form 9 appended to the rules in drafting lawsuits? Or must complaints contain factual allegations beyond the approximate date and location of the alleged wrong and a brief description of the nature of the wrong, such as negligence or some sort of intentional act?

May a complaint be dismissed under federal rule of procedure 12(b)(6) even though it clearly complied with federal rule of civil procedure 8 and form 9 appended to the rules, *and* the plaintiff filed with the court his affidavit setting forth the detailed factual basis of his obviously colorable claim that the defendants had acted in various ways so as to "blackball" him with prospective employers in his community?

PARTIES TO THE PROCEEDING

The petitioner is Danny Maiden, a resident of Kentucky,

One of the respondents is Steve Shaver, a resident of Kentucky.

The other respondent is North American Stainless, Limited Partnership. According to this respondent, North American Stainless, Limited Partnership, is a Delaware limited partnership having Delaware corporations as both its general partner and limited partner. It is a subsidiary or affiliate of Acerinox, S.A. (shares publicly traded on the Madrid Stock Exchange), which owns approximately 99% of its shares; the remaining stock is owned by individuals or entities not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The district court's Memorandum Opinion and Order (per Hood, D.J.) denying petitioner's motion to remand this case to the Carroll Circuit Court of the Commonwealth of Kentucky for lack of diversity jurisdiction was entered on October 27, 2003, and appears at pages 13a to 17a of this petition.

The district court's Order denying the petitioner's motion to alter, amend, or vacate the Order of October 27, 2003, was entered on November 25, 2003, and appears at pages 18a to 19a of this petition.

The district court's Memorandum Opinion and Order dismissing the petitioner's lawsuit was entered on March 19, 2004, and appears at pages 6a to 12a of this petition.

The district court's Order holding dispositive motions in abeyance until the petitioner's motion for remand to state court was decided was entered on September 30, 2003, and appears at pages 22a to 23a of this petition.

The court of appeals opinion (per curiam) affirming the orders of the district court was filed on December 29, 2005, and appears at pages 1a to 5a of this petition.

The court of appeals order denying rehearing and rehearing en banc was entered on March 30, 2005, and appears at page 20a of this petition.

JURISDICTION OF THE COURT

The Order sought to be reviewed was entered on December 29, 2005 (per curiam opinion). Reconsideration was denied on March 30, 2006.

Petitioner invokes the jurisdiction of this Court under 28 United States Code Section 1254(1).

STATUTORY AND RULES PROVISIONS INVOLVED IN THIS CASE

28 United States Code §1441(b)

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Kentucky Revised Statutes §500.080(14)

"Possession" means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object.

Kentucky Revised Statutes §514.110

(1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

(2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.

Federal Rule of Civil Procedure 1

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or the admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Federal Rule of Civil Procedure 8(a)(2), (3)
Kentucky Rule of Civil Procedure 8.01(1)(a), (b)

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Federal Rule of Civil Procedure 12(b)(6)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by

motion: . . . (6) failure to state a claim upon which relief can be granted . . .

Federal Rule of Civil Procedure 84
Kentucky Rule of Civil Procedure 84

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

Federal Rules of Civil Procedure, Appendix of Forms, Form 9 Kentucky Rules of Civil Procedure, Appendix of Forms, Form 8

1. Allegation of jurisdiction [absent in Kentucky form].

2. On June 1, 1936, in a public highway called Boylston Street [Capital Avenue in the Kentucky form] in Boston, Massachusetts [Frankfort, Kentucky in the Kentucky form] defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

Rule of the Supreme Court of the United States 10

[Among the character of the reasons the Court considers in determining whether to grant review on a writ of certiorari are the following,] that:

> (a) a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .

(c) a . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . .

STATEMENT OF THE CASE

Facts

The respondent, North American Stainless, Limited Partnership (hereinafter NAS) is a large manufacturer with a plant in Carroll County, Kentucky (APX for the Court of Appeals, hereinafter, APX, pp. 138-139). One of its management level employees at the time of the events of this case was respondent Steve Shaver (APX, pp. 16, 113, 140; this brief, p. 31a).

In February, 2002, NAS hired petitioner, Danny Maiden, to operate heavy equipment and perform other labor for it.

During July, 2002, the Carroll County sheriff appeared at NAS looking for a stolen caterpillar trackhoe, model #132 (APX, pp. 113-114; this brief, p. 31a).

Maiden had operated this stolen machine. When the sheriff "point blank" asked Maiden where the trackhoe was, and told Maiden that, " . . . he must tell if he knew about it," Maiden identified the stolen equipment to the sheriff (APX, p. 114; this brief, pp. 31a-32a).

Thereafter, Carroll County authorities found and successfully prosecuted the individual who had stolen the trackhoe, one Timothy Allen Miller (APX, p. 114; this brief, p. 32a).

Very shortly after Maiden helped the Carroll County sheriff recover the stolen trackhoe from NAS, Steve Shaver told Maiden that he, " . . . would regret that he had cooperated with the sheriff in recovering the stolen property" (APX, p. 114, this brief, p. 32a).

On August 29, 2002, Shaver ordered Maiden's direct boss at NAS, Dave Whittington, to fire Maiden, which Whittington did (APX, pp. 109-112, 140).

NAS and Shaver then launched a campaign to insure that Maiden never again worked in the construction industry in Carroll County.

They told at least three of Maiden's prospective employers – M & M Towing of Prestonville, Kentucky; Davis and Burton Construction Company of West Virginia; and System Construction Company of Arkansas – not to hire Maiden (APX, pp. 114-115; this brief, pp. 32a-33a). They also told these employers, all of whom were NAS subcontractors, that if they hired Maiden anyhow NAS would sever all business ties with them (APX, pp. 114-115; this brief, pp. 32a-33a).

In addition, Shaver and other North American employees placed "wanted posters" of Maiden in various conspicuous places throughout Carroll County. These posters included pictures of Maiden and falsely stated that Danny Maiden was "wanted for arrest and should and would be arrested if seen" (APX, p. 115; this brief, p. 33a).

The Complaint

On August 19, 2003, petitioner sued the respondents in the Carroll Circuit Court of the Commonwealth of Kentucky (APX, pp. 14-20; this brief, pp. 24a-30a).

Maiden asserted two claims.

The first was that the respondents ha ` wrongfully discharged Maiden in retaliation for his cooperating with the Carroll County sheriff in identifying stolen equipment that North American Stainless was using on its premises (APX, pp. 2-5; this brief, pp. 25a-27a).

The second was that the respondents had maliciously interfered with Maiden's prospect of employment with businesses and employers in Carroll County, Kentucky (APX, pp. 17-18; this brief, pp. 27a-28a).

The caption of Maiden's complaint names as one of the defendants:

> STEVE SHAVER,
> an individual, individually, and
> as agent of NORTH AMERICAN STAINLESS, L.P.
> (APX, p. 14; this brief, p. 24a).

Paragraph 3 of the Complaint, under the heading "GENERAL ALLEGATIONS," states as follows:

> 3. That the Defendant Steve Shaver is, and was at all times relevant hereto, an individual, and a citizen and resident of Ghent, Carroll County, Kentucky, and was acting individually, and also he was acting in his capacity as agent of NAS [North American Stainless, L.P.] (APX, p. 15, this brief, p. 25a).

Paragraph 11 of the Complaint states that on August 29, 2002, the Plaintiff was discharged from his employment by NAS, " . . . acting through the Defendant Steve Shaver and others" (APX, p. 16; this brief, p. 26a).

Maiden's Complaint also contained these two paragraphs:

> 17. That subsequent to his discharge complained of herein, acting by and through the Defendant Steve Shaver and others, NAS began a series of wrongful steps to maliciously interfere with Plaintiff's expectancy of prospective business and employment relations by, and between this Plaintiff, and other businesses and employers in the Carrollton area (APX, p. 17; this brief, p. 27a).
>
> . . . .
>
> 20. That acting by and through Steve Shaver and others, NAS engaged in intentional acts of interference and obstruction of the Plaintiff's expectancy of these many valid business and employment relations after his discharge from NAS, with malice and with the improper motive of further punishing and retaliating against the Plaintiff (APX, p. 13; this brief, pp. 27a-28a).

In his Prayer for Relief, the Maiden demanded "Judgement in favor of the Plaintiff and against the Defendants NAS and Steve Shaver," for both compensatory and punitive damages (APX, p. 20; this brief, pp. 29a-30a, #2, #3).

Procedural History of the Case

Respondents removed this lawsuit to the United states District Court for Eastern Kentucky at Frankfort

upon the purported bases that NAS is incorporated and residing in the state of Delaware and that petitioner Maiden had "fraudulently joined" Shaver, a Kentucky resident, as a party/defendant to the lawsuit (APX, p. 10).

Along with their removal petition, the respondents filed a motion to dismiss petitioner's lawsuit, pursuant to federal rule of civil procedure 12(b)(6).

There followed months of jockeying by the parties. The petitioner sought to have the case remanded to the Carroll Circuit Court, as authorized by 28 United States Code §1447(c), and to have the motion to dismiss held in abeyance. Respondents objected; responses and replies resulted. During the course of these proceedings, on October 6, 2003, the petitioner filed an affidavit setting forth the factual basis of his claims (APX, pp. 113-116; this brief, pp. 31a-34a) and the respondents filed a 266 page transcript of proceedings before the Kentucky Occupational Safety and Health agency. Thereafter, petitioner filed a second affidavit. It explained petitioner's testimony that was contained in this transcript. Alone among the pleadings and exhibits tendered by the parties, the District Court rejected this one (APX, p. 79).

The Court did make one concession to the petitioner during the tangled course of the proceedings before it. It held in abeyance the respondent's motion to dismiss until after it ruled on the petitioner's motion to remand.

On October 27, 2003, the District Court denied this motion.

The Court opined that petitioner had "fraudulently joined" the respondent Steve Shaver because petitioner's

lawsuit, " . . . did not seek any relief directly from Shaver" (APX, p. 46; this brief, p. 16a).

As we have just seen, of course, this was simply not true (this brief, p. 8; APX, p. 20; this brief, p. 29a; #2, #3).

Even more alarming than its misapprehension of the plain language of petitioner's complaint was the District Court's legal analysis of petitioner's claims against Shaver. The Court opined that:

> . . . Maiden ultimately would be unable to state a cause of action against Shaver, as he is merely an agent of Defendant NAS. As an agent of NAS, Shaver did nothing other than act in his official capacity. Indeed, it has not been alleged that Shaver did anything wrongful except execute the allegedly wrongful act of the corporate defendant. The alleged wrongs of which Plaintiff complains are all corporate wrongs. Plaintiff does not and apparently can not allege that the individual defendant owed him any duty in his individual capacity, nor that he did any act in his individual capacity which violated any duty or otherwise caused plaintiff harm except as a result of corporate acts. (APX, p. 46; this brief, p. 16a).

On March 22, 2004, the District Court finally dismissed petitioner's lawsuit.

In its opinion accompany the dismissal Order, the Court cited three reasons for this action. They were that:

> 1. Maiden had impermissibly "split" his cause of action by failing to bring his claims in a previous lawsuit against North American, in which he had alleged that NAS fired him in retaliation for making a complaint of unsafe working conditions

to the Kentucky version of OSHA (APX, pp. 52-54; this brief, pp. 8a-9a);

2. Maiden failed to state a claim for wrongful discharge under Kentucky law, there being no, " . . . fundamental and well-defined public policy," concerning co-operation with law enforcement authorities under Kentucky law (APX, pp. 54-55; this brief, pp. 9a-10a); and

3. Maiden failed to state a claim for improper interference with his prospect of future employment because he articulated no facts in support of his claim and did not bring forth any such facts in any pleadings before the Court (APX, pp. 55-57; this brief, pp. 11a-12a).

Maiden then appealed to the United States Court of Appeals for the Sixth Circuit.

His first argument was that the District Court never had jurisdiction over the case because he had not "fraudulently joined" the respondent Shaver. Maiden pointed out that the district court's characterization of the ordinary tort claim of intentional interference with prospective advantage as a "corporate wrong" was an egregious departure from all principles of Kentucky and American jurisprudence, with no authority either in the opinion of the district court or anywhere else. Maiden cited the obvious facts that his lawsuit had clearly pleaded that Shaver was individually responsible for the tort claims charged against him and that Maiden plainly sought a recovery from Shaver as well as the respondent NAS. Maiden urged the Court of Appeals to reverse the lower court and order it to remand this case to the Carroll Circuit Court for a lack of diversity jurisdiction pursuant to 28 United States Code §1447(c) and *Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Maiden next argued that he had not "split" his cause of action. His prior lawsuit was dismissed for lack of jurisdiction. It was therefore a nullity that could not form the basis of any sort of viable defense to the lawsuit that is the subject of this petition. Furthermore, the events surrounding his claim of intentional interference with the prospect of employment post-dated the events described in the first lawsuit.

Maiden also insisted that he had articulated a viable wrongful discharge claim under Kentucky law by alleging that he was fired for cooperating with the Carroll County sheriff in recovering stolen property from the respondents. Had Maiden not so cooperated and continued operating the stolen trackhoe, he would have been guilty of felony receiving stolen property, Kentucky Revised Statutes, §514.110, 500.080(14). This is the classic framework for a common-law wrongful discharge claim in Kentucky, *Gryzb v. Evans,* 700 S.W.2d 398, 401 (Ky. 1984).

Finally, Maiden argued that his intentional interference claim should not have been dismissed for any lack of specificity.

First of all, Maiden pointed out that the rules of pleading, do not require a recitation of facts, but only, " . . . a short and plain statement of the claim showing that the pleader is entitled to relief," federal rule of civil procedure 8(a), Kentucky rule of civil procedure 8.01(1). He even inserted a copy of official form 9 of the federal rules of civil procedure, "Complaint for Negligence," for perusal by the appellate judges to illustrate that paragraphs 17 and 20 of his actual complaint (this brief, p. 8) complied with accepted norms for pleading.

Maiden also argued that motions made under federal rule of civil procedure 12(b)(6) are disfavored and rarely granted; indeed they are only granted where it appears that the pleading party would be entitled to relief under no state of facts which could be proven in support of his claim, *Hartford Fire Insurance Co. v. California,* 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

Furthermore, Maiden pointed out that if it were necessary for him to produce facts in order to avoid the dismissal of his lawsuit, he had done so in his affidavit. Again, this testimony outlined the respondents' bringing economic pressure on three specifically named employers not to hire Maiden. It also recounted the fact that respondents had put up vile and false "wanted" posters of Maiden around Carrollton (This brief, p. 6; APX, pp. 114-115; this brief, p. 33a).

On December 29, 2005, the court of appeals issued a per curiam opinion affirming the district court's dismissal of Danny Maiden's lawsuit.

In its opinion, the appellate court ignored the district court's "corporate wrongs" theory. The court also ignored the plain language of Maiden's lawsuit. It agreed with the district court that Maiden's complaint, " . . . neither sought any relief directly from Shaver nor alleged that Shaver himself acted unlawfully;" and that "the complaint did not seek damages from Shaver individually" (Opinion of the court of appeals, p. 3; this brief, p. 3a). Therefore, according to the court, there was no "colorable cause of action against Shaver," and he had been "fraudulently joined" to Maiden's lawsuit (Opinion of the court of appeals, p. 3; this brief, p. 3a).

The court of appeals also rejected Maiden's wrongful discharge claim on the merits. It held that Kentucky law does not require individuals to co-operate with law enforcement personnel. (Opinion of the court of appeals, p. 4; this brief, p. 4a). It ignored Maiden's argument that if he had aided NAS in continuing to hide the stolen trackhoe, which Maiden himself had operated, he would be guilty of receiving stolen property under Kentucky law.

The appellate court opined that Maiden had failed to "allege a factual predicate" to support his claim of intentional interference with the prospect of employment (Opinion of the court of appeals, p. 4; this brief, p. 4a). It ignored Maiden's citation of federal rule of civil procedure 8(a) and official form 9 appended to the rules. Incredibly, it held that the district court was not obliged to consider Maiden's affidavit (Opinion of the court of appeals, p. 4; this brief, p. 4a), despite the facts that, the affidavit was a part of the record of the district court and clearly set forth facts sufficient to withstand summary judgment, much less a motion to dismiss for failure to state a claim!

Maiden filed a petition for rehearing or rehearing en banc after receiving the ruling of the court of appeals. On March 30, 2006, the court of appeals denied this petition (Order of the court of appeals, this brief, pp. 20a-21a).

ARGUMENT

I. The Jurisdictional Issue.

The district court should have remanded this case to the Carroll Circuit Court of the Commonwealth of Kentucky.

The court of appeals should have reversed the judgment of the district court for failing to remand this case.

Instead, the court of appeals agreed with the district court that petitioner had "fraudulently joined" the respondent, Steve Shaver, as a party-defendant. According to the appellate court, petitioner's, " . . . complaint neither sought any relief from Shaver nor alleged that Shaver himself acted unlawfully," and, "the complaint did not seek damages from Shaver individually" (Opinion of the court of appeals, p. 3; this brief, p. 3a).

Again, this is simply not true.

In the caption of his complaint and in paragraphs 3, 11, 17, and 20, petitioner clearly alleged that respondent Shaver acted unlawfully toward him. In the prayer for relief of his lawsuit, petitioner certainly sought damages from Shaver as an individual.

Petitioner's complaint met all of the requirements of federal rule of civil procedure 8(a) and official form 9, appended to the rules (see federal rule of civil procedure 84), in pleading his claims for relief against respondent Shaver.*

The court of appeals was wrong to conclude that there was an, " . . . absence of a colorable cause of action against Shaver" (Opinion of the court of appeals, p. 3; this brief, p. 3a). This conclusion runs completely counter to the well-settled law on this issue. The opinion of the court of appeals itself correctly noted that in reviewing respondents' federal rule of civil procedure 12(b)(6) motion to dismiss, its duty was to:

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* See petitioner's next argument.

> . . . view the complaint in the light most favorable to Maiden, accept his factual allegations as true, and determine whether Maiden can prove any set of facts in support of his claims that would entitle him to relief [Opinion of the court of appeals, p. 2, citing *Perry v. American Tobacco Co.*, 324 F.3d 845, 848 (6th Cir., 2003); this brief, p. 2a).

In refusing to follow this simple rule, the court of appeals, " . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," Rule 10(a) of the Supreme Court.

If this were not enough to justify the granting of this petition, there is the matter of the district court's announcement of its "corporate wrongs" theory of individual non-liability (this brief, p. 10; APX, p. 46; this brief, p. 16a).

This theory is counter to the basic principle of Kentucky and American tort law; indeed of American jurisprudence itself. That principle is that an individual is responsible for his intentional acts, *Sherwood v. Huber Motor Express,* 151 S.W.2d 1007 (Ky. 1941). Without this principle, there could be no "corporate wrongs" as corporations can act only through their individual employees and agents.

This district court's "corporate wrongs" theory is incredible. It is identical to the "Nuremburg defense" that Nazi war criminals articulated at their trials after World War II. It is so odious to our national spirit as to demand the condemnation of this Court, more so since the court of

appeals failed to even acknowledge the district court's plain articulation of it!

If the mere statement of this theory were not evil enough, we should consider its nefarious practical applications.

The "corporate wrongs" theory would completely eviscerate the rights of injured persons ever to sue individuals who commit intentional wrongs in the course of their employment.

Furthermore, the theory would make every case of joint and several liability by employers and employees removable to federal court where the employer is a non-resident of a plaintiff's home state, without any regard for the residence of individual tortfeasors named as parties-defendant, in clear violation of the public policy set forth at 28 United States Code §1441(b).

That the district court could justify its jurisdiction based upon this theory, and that the court of appeals could affirm the district court's so doing, is scandalous. The court of appeals' role in this business amounts to its sanctioning so distant a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power pursuant to Rule 10(a) of the Supreme Court.

II. The Sufficiency of the Complaint Issue

The courts below held that petitioner's complaint failed, " . . . to allege a factual predicate to support [the] claim," of intentional interference with petitioner's prospect of employment (Opinion of the court of appeals, p. 4; this brief, p. 4a).

Federal rule of civil procedure 8(a) does not require any sort of "factual predicate" beyond that which the petitioner pleaded in support of this claim. As official form 9 of the federal rules and the plain language of federal rule of civil procedure 8(a) indicate, all that a plaintiff must plead is a statement of his claim. This includes some articulation of the plaintiff's theory of recovery, such as negligence or some sort of intentional act, along with some indication of the date and location of the alleged wrong. In official form 9, the precise date and time are indicated. In petitioner's complaint, the time of his intentional interference claim is narrowed down to that period, " . . . subsequent to his discharge complained of herein" (APX, p. 17; this brief, p. 27a, ¶17). At ¶11 of petitioner's complaint, the date of his discharge is identified as August 29, 2002. (APX, p. 16; this brief, p. 26a). Thus the complaint serves to put the respondents on notice as to the dates of the alleged wrongful *acts* sufficient to permit them to raise any limitations defenses, of which there are none in this case in any event.

In official form 9, the precise location of the accident is set forth. In petitioner's complaint, the location is indicated in more general terms as "throughout Carroll County." This clearly suffices as petitioner is complaining of a series of acts that did not take place at any one location. Indeed, at the time he filed his lawsuit, petitioner may not even have known all of the locations of the wrongs he alleged, such as the places where respondents warned off his prospective employers and all of the locations where they had put up "wanted" posters of him.

The district court's assertion that, "Plaintiff's complaint is completely devoid of any factual allegations" (APX, p. 56, this brief, p. 11a), is, therefore, simply false as to the facts relating to the date and location of this tort. Clearly petitioner pleaded enough such facts to overcome

any limitations defenses and to put the respondents on notice as to the date and location of his claims!

The district court also complained that the petitioner, " . . . fail[ed] to allege that the alleged interference occurred by use of improper means," and that the petitioner, " . . . fail[ed] to explain [in his complaint] *how* the defendants interfered at all" (APX, p. 56, this brief, p. 11a; emphasis original).

Of course, this sort of heightened pleading is not required under federal rule of civil procedure 8(a) or its Kentucky equivalent. Official form 9 appended to the federal rules, and its Kentucky counterpart, official form 8, clearly illustrate this proposition.

In official form 9 appended to the federal rules, there are no facts supporting the plaintiff's claim of negligence. We are not told if the defendant ran a red light, if he was going too fast, or if he was driving drunk. Form 9 only informs us that the defendant was negligent, not *how* he was negligent.

Petitioner's complaint is no different. It does not inform us *how* the respondents intentionally interfered with his prospects of employment after respondents fired him. There was no requirement in the federal rules that it do so.

The law is clear that a complaint may not be dismissed for the sort of factual omissions cited by the Courts below.

This case was dismissed pursuant to federal rule of civil procedure 12(b)(6). As the court of appeals noted, such dismissals are authorized *only* when a complaint is so deficient that the plaintiff would not be entitled to relief under any state of facts which could be proven in support

of his claims (Opinion of the court of appeals, p. 2; this brief, p. 2a). The court of appeals cited the case of *Perry v. American Tobacco Co.*, 324 F.3d 845, 848 (6th Cir., 2003) for this proposition. This Court itself actually articulated this rule at least as far back as the case of *Hartford Fire Insurance Co. v. California,* 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

This rule would make no sense, and have no meaning, if its contrary were true: that a complaint should be dismissed if it did not, itself, articulate a set of facts which could be proven in support of the pleader's claim. This contrary rule would amount to a return to "code pleading," which was replaced by the current rules' "notice" pleading approximately sixty years ago.

The error of the opinions and actions of the courts below is magnified in this case because the petitioner so obviously *could* prove facts that support his claim of intentional interference. Indeed, his affidavit indicates that he actually did this! The facts set forth in petitioner's affidavit, which is a part of the record in this case, clearly present a viable claim of intentional interference with the prospect of employment under Kentucky law, *National Collegiate Athletic Association v. Hornung,* 754 S.W.2d 855 (Ky. 1988), *Henkin, Inc. v. Berea Bank & Trust Co.,* 566 S.W.2d 420, 425 (Ky. App. 1978).

Neither of the courts below challenged this proposition. Instead, they wrongly held that petitioner should have put the facts that supported his intentional interference claim in his complaint.

Are we to return to "code" pleading, or to some sort of hybrid "heightened" pleading requirements for everyday common-law claims? This is an important question of federal law, and the opinions of the courts below conflict

with existing law on the question, thereby justifying this Court's granting this petitioner under Rule 10(c) of this Court.

Even if these are not important questions of federal law, which might be the case if we assume that federal courts are unlikely to repeat the particular injustice at issue in this case, this Court should still grant this petition. This is because the district court's ignoring of the language of federal rule of civil procdure 8(a) and the guidance of appended form 9, constitute so far a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power pursuant to Rule 10(a) of the Supreme Court.

The court of appeal's sanctioning of the district court's actions in this case provide an independent basis for this Court's granting of this petition. *Id.*

III. The Justice Issue

Federal rule of civil procedure 1 requires that the rules be construed and administered so as, " . . . to secure the just, speedy, and inexpensive determination of every action."

The courts below have violated this rule in this case. Petitioner has not had his day in court. The district court usurped the jurisdiction of a Kentucky state court and then refused even to properly consider the merits of petitioner's claims. The court of appeals affirmed this egregious injustice, which only this Court has the power to rectify.

CONCLUSION

For the reasons stated in this brief, the petitioner requests that this Court issue a writ of certiorari to the court of appeals.

Respectfully submitted,

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APPENDIX

2005 WL 3557175

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-5443

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DANNY L. MAIDEN, Plaintiff-Appellant, v. NORTH AMERICAN STAINLESS; STEVE SHAVER, Defendants-Appellees.	))))))))	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (Filed Dec. 29, 2005)

Before: GILMAN and COOK, Circuit Judges; MILLS, District Judge.*

PER CURIAM. Danny Maiden appeals two district court orders denying his motion to remand to state court and dismissing his complaint against his former employer North American Stainless ("NAS") and supervisor Steve Shaver. Finding no error in the district court's fraudulent-joinder conclusion and agreeing with the district court that Maiden failed to state a claim upon which relief may be granted, we affirm.

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* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

I

NAS, through its agent Shaver, discharged Maiden, an at-will employee. Maiden filed a complaint in state court alleging NAS and Shaver: 1) wrongfully discharged him in retaliation for his cooperating in a stolen-property investigation; and 2) intentionally interfered with his prospective employment relations after the discharge. NAS and Shaver removed the complaint to federal district court on diversity-jurisdiction grounds, claiming that Maiden fraudulently joined Shaver (a non-diverse party) to defeat federal jurisdiction. Maiden moved for remand to state court, saying that at the time of removal, non-diverse defendant Shaver precluded federal jurisdiction. The district court denied the motion, agreeing with NAS and Shaver that inasmuch as Maiden fraudulently joined Shaver, jurisdiction in the district court was proper.

NAS and Shaver then moved to dismiss under Fed. R. Civ. P. 12(b)(6). The district court dismissed both claims. This appeal followed.

II

We review de novo 12(b)(6) dismissals. *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 848 (6th Cir. 2003). We view the complaint in the light most favorable to Maiden, accept his factual allegations as true, and determine whether Maiden can prove any set of facts in support of his claims that would entitle him to relief. *Id.*

As a preliminary matter, we assess the jurisdictional issue surrounding whether Maiden fraudulently joined Shaver. In deciding whether Maiden fraudulently joined Shaver, we examine the complaint, as the district court did, to determine whether the complaint evidenced that

Maiden "had at least a colorable cause of action against [Shaver] in the . . . state courts." *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999); *Salisbury v. Purdue Pharma, L.P.*, 166 F.Supp.2d 546, 549 (E.D. Ky. 2001).

In pleading both his wrongful-termination claim and his intentional-interference claim, Maiden targeted NAS as "acting by and through [Shaver]. . . ." But Maiden's complaint neither sought any relief directly from Shaver nor alleged that Shaver himself acted unlawfully; the complaint did not seek damages from Shaver individually. In the absence of a colorable cause of action against Shaver, the district court properly determined Maiden fraudulently joined Shaver. That being so, we find no error in the denial of Maiden's motion to remand the case to state court.

III

We also reject Maiden's argument that the district court erred in granting Defendants' motion to dismiss for failure to state a claim. First, as to the wrongful-discharge claim, Maiden's at-will-employee status allowed NAS to terminate him "for good cause, no cause, or for a cause that some might view as morally indefensible," unless "the discharge [was] contrary to a fundamental and well-defined public policy as evidenced by existing law." *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 733-34 (Ky. 1983) (concluding that K.R.S. § 342 sets forth "an important public interest that injured employees shall receive, and employers shall be obligated to pay, for medical expenses, rehabilitative services and a portion of lost wages," and any "action on the part of an employer

which prevents an employee from asserting his statutory right to medical treatment and compensation violates that policy"). The district court found that Maiden failed to allege a public policy violation to support the claim, and we agree.

In his complaint, Maiden pleaded that "the discharge ... was substantially motivated by retaliation ... for Plaintiff having lawfully cooperated with the Sheriff in recovery of the stolen property." He further pleaded, "[T]he Plaintiff had solemn duties and rights to cooperate with the enforcement of the criminal laws of this Commonwealth, and those rights are established and protected by the constitutions, by specific statutes, and also by the well-established public policy of ... Kentucky, and these United States." As the district court correctly found, however, Maiden failed to identify any fundamental and well-defined public policy as evidenced by existing law requiring that Kentuckians cooperate with law enforcement. Maiden's brief fails to point to any case establishing such a well-defined public policy; he cites only irrelevant criminal statutes and *Firestone Textile Co. Div.*, the key Kentucky case (also cited by the district court) that established the public-policy exception to Kentucky's at-will employment defense to wrongful discharge claims.

Regarding Maiden's intentional-interference claim, the district court properly dismissed for Maiden's failure to allege a factual predicate to support that claim. Maiden does not challenge the district court's conclusion that his *complaint* lacked factual allegations. He contends rather that the district court erred by refusing to consider his *affidavit*, wherein he set forth the factual circumstances of his claim. In ruling on a motion to dismiss, courts generally look to the allegations in the complaint. Courts may

consider matters outside the pleadings that "are presented to and *not excluded by the court.*" Fed. R. Civ. P. 12(c) (emphasis added). Courts are not, however, required to do so. "[I]t is well-settled that it is within the district court's discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment or to reject it and maintain the character of the motion." 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1371 (4th ed.2005). Thus, the district court did not err by refusing to consider the affidavit.

IV

Because Maiden can prove no set of facts in support of his claims entitling him to relief, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

DANNY MAIDEN, Plaintiff, v. NORTH AMERICAN STAINLESS, L.P., et al., Defendants.	)	Civil Action No. 3:03-59-JMH **MEMORANDUM OPINION AND ORDER** (Filed Mar. 19, 2004)

* * * * * * * * * *

Defendants, North American Stainless, L.P. ("NAS") and Steve Shaver ("Shaver"), have moved this Court to dismiss pursuant to Fed. R. Civ. Pro. 12(c). [Record No. 2]. Plaintiff, Danny Maiden ("Maiden"), has responded [Record No. 22] to which Defendants have replied [Record No. 23]. This matter is now ripe for decision.

FACTUAL BACKGROUND

North American Stainless, L.P. ("NAS"), owns and operates a stainless steel manufacturing facility in Carroll County, Kentucky. Plaintiff is a former at-will employee of NAS. In his complaint, Plaintiff states that on or about August 29, 2002, NAS, acting through Defendant Steve Shaver ("Shaver") and others, wrongfully discharged him. In Count One, Plaintiff alleges that he was wrongfully terminated in retaliation for cooperating with the Carroll County Sheriff in a stolen property investigation. In Count Two, Plaintiff alleges that NAS and Shaver, as NAS' agent, improperly and maliciously interfered with Plaintiff's prospective business and employment relations. Count Three merely asserts that NAS is liable for Shaver's

conduct under Counts One and Two due to their agency relationship. Count Four demands punitive damages for the claims asserted in Counts One and Two. Plaintiff filed this civil action in Carroll Circuit Court on August 19, 2003, seeking damages, both compensatory and punitive, for the alleged wrongs complained of. The case was removed to this Court on September 8, 2003, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

STANDARD OF REVIEW

When reviewing a motion to dismiss, the Court must "construe the complaint in the light most favorable to the plaintiff." *Uttilla v. City of Memphis,* 40 F. Supp.2d 968, 970 (W.D. Tenn. 1999) (quoting *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.1990)). In *Persian Galleries, Inc. v. Transcontinental Ins. Co.,* 38 F.3d 253, 258 (6th Cir.1994), the Court of Appeals held that "[a] district court's grant of a motion to dismiss is proper when there is no set of facts that would allow the plaintiff to recover." *Id.* The Supreme Court of the United States has determined that a complaint may be dismissed only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. Spalding,* 467 U.S. 69, 73 (1984).

While this standard of review is liberal, the plaintiff is required to put more than the bare assertion of legal conclusions. Clearly, "a plaintiff's complaint will not survive a motion to dismiss under Rule 12(b)(6) unless it contains either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Uttilla,* 40 F. Supp.2d at 970. Therefore,

"a district court need not accept as true conclusions of law or unwarranted factual inferences." *Id.* at 970-71.

DISCUSSION

The complaint, attached to the Notice of Removal [Record No. 1], indicates that Maiden pursues the following claims against NAS and Steve Shaver: wrongful discharge in violation of public policy and improper and malicious interference with Plaintiff's prospective business and employment relations. The defendants contend that the evidence shows, without question, that as a matter of law Maiden is unable to succeed on any of these theories.

A. Split Cause of Action

Defendants first assertion is that Count One of the Complaint, wrongful termination, must be dismissed because Plaintiff has improperly split his cause of action. Defendants note that there are two other pending proceedings all arising out of NAS' alleged wrongful termination of Plaintiff in August, 2002.[1] Specifically, Defendants note that Plaintiff has asserted, in the two prior cases, that NAS terminated him in retaliation for making workplace health and safety complaints to the Commonwealth of Kentucky, Department of Environmental Protection.

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[1] The Pending Kentucky Occupational Safety and Health Program Complaint against NAS, KOSHRC Docket No. D-37-03, and Plaintiff's appeal of the dismissal of his Complaint against NAS in Case No. 3:03-cv-14-JMH (*Maiden I*) now pending in the United States Circuit Court of Appeals for the Sixth Circuit.

The doctrine of res judicata has a subsidiary rule that a cause of action may not be split and tried piecemeal. Both rest on the foundation that issues which have been once litigated cannot be the subject matter of a later action. Both rules are necessary in the administration of justice. *Egbert v. Curtis,* 695 S.W.2d 123, 124 (Ky., 1985) (citing *Hays v. Sturgill,* 193 S.W.2d 648 (Ky., 1946)). Stated another way, the subsidiary rule makes res judicata applicable not only to the issues disposed of in the first action, but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time. *Id.*

It is apparent to the Court that Plaintiff improperly split his wrongful termination cause of action. First, it is irrefutable that the same parties are involved in both this case and *Maiden I.* Second, there can be no dispute that both this case and *Maiden I* arise out of the same event or transaction, namely, NAS' termination of Plaintiff on or about August 29, 2002. Finally, it is indisputable that Plaintiff has asserted the same cause of action – wrongful termination – in both cases. The only difference between the two cases is that Plaintiff alleges a different basis for the retaliation leading to his alleged wrongful termination in the two Complaints. If this were not considered claim splitting, the Plaintiff could assert different basis for his alleged wrongful termination ad nauseam. The law does not allow this.

B. Failure to State a Claim for Wrongful Termination Under Kentucky Law

Were the Court to find Plaintiff did not improperly split his cause of action, Count I would nevertheless be

dismissed for failure to state a claim for wrongful termination. In his Complaint, Plaintiff asserts a cause of action for wrongful termination based on NAS' and Shaver's alleged retaliation for Plaintiff's cooperation with the Carroll Country [sic] Sheriff in a stolen property investigation. As an at-will employee, NAS could have terminated Plaintiff "for good cause, no cause, or for a cause that some might view as morally indefensible . . . " *Firestone Textile Co. Div. v. Meadows,* 666 S.W.2d 730, 731 (Ky., 1983) unless, "the discharge [was] contrary to a fundamental and well-defined public policy as evidenced by existing law . . . " *Id.* "The public policy must be evidenced by a constitutional or statutory provision." *Id.*

Plaintiff has the burden of demonstrating the existence of a public policy NAS allegedly violated when NAS terminated him. See *Stump v. Walmart Stores, Inc.,* 942 F.Supp. 347, 349 (E.D. Ky. 1996) (citing *Bennett v. Jones,* 851 S.W.2d 494 (Ky. Ct. App. 1993). In his Complaint, Plaintiff references no specific constitutional or statutory right, nor any statutory duty to cooperate with law enforcement in an investigation. Furthermore, in his response to the motion *sub judice,* Plaintiff makes no reference to any "fundamental and well-defined" public policy, contained in existing law, concerning cooperation with law enforcement.

The Court is unable to discern what "fundamental and well-defined" public policy Maiden is claiming was violated. As this burden is clearly on Maiden, his failure to allege any public policy exception to the at-will employment doctrine dooms his claim. As such, Plaintiff's wrongful discharge claim fails as a matter of law and must be dismissed.

C. Failure to State a Claim for Intentional Interference with Prospective Business Relations under Kentucky Law

In Count II of his Complaint, Plaintiff alleges that NAS, though Shaver and others, intentionally interfered with Plaintiff's prospective business and employment relations. To prevail on such a claim, Plaintiff must show that Defendants intentionally interfered with Plaintiff's business prospects and that this interference caused Plaintiff to lose profits to which he would have otherwise been entitled. The interference must have been intentional and must have occurred by the use of improper means. *Cullen v. South East Coal Co.*, 685 S.W.2d 187 (Ky. 1984).

Not only does Plaintiff fail to allege that the alleged interference occurred by the use of improper means, he fails to explain how the defendants interfered at all. In fact, Plaintiff's complaint is completely devoid of any factual allegations. Plaintiff simply makes conclusory allegations stating that after his discharge, Defendants "began a series of wrongful steps to maliciously interfere with Plaintiff's expectancy of prospective business and employment relations by, and between this Plaintiff, and other businesses and employers in the Carrollton area." (Complaint, ¶ 17). Plaintiff does nothing to elucidate the factual conditions surrounding this allegation in his response to Defendants' motion to dismiss.[2]

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[2] In his response to Defendants' motion to dismiss, Plaintiff states that "NAS and Shaver 'blackballed' the Plaintiff by tortiously interfering with Plaintiff's efforts to obtain other employment by nearly every conceivable unlawful means." Plaintiff, however, fails to inform the court about any factual instances that would support this conclusory allegation. In fact, the Plaintiff doesn't state *any* "conceivable unlawful

(Continued on following page)

Since Plaintiff fails to allege that the defendants used improper means in allegedly interfering with Plaintiff's prospective business relations, his Complaint fails to state a claim for relief on this cause of action and must be dismissed.

Finally, the Court notes that Plaintiff's response to Defendants' motion to dismiss is replete with references to the issue of fraudulent joinder. The Court previously admonished Plaintiff's counsel about mentioning this issue again as the Court has thoroughly addressed it on multiple occasions.[3] The court is exasperated by Plaintiff's counsel apparent inability to follow Order's issued by this Court.

For the reasons discussed above,

IT IS ORDERED,

(1) That Defendants, North American Stainless, L.P. and Steve Shaver's motion for dismissal of this action [Record No. 2] be, and the same hereby is, **GRANTED**; and

(2) That this action be, and the same hereby is, **DISMISSED WITH PREJUDICE**.

This the 19th day of March, 2004.

Signed By:

[SEAL] /s/ Joseph M. Hood (JMH)
United States District Judge

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mean" by which NAS and Shaver interfered with Plaintiff's efforts to obtain other employment.

[3] See Court Order dated February 4, 2004 [Record No. 20]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 03-59-JMH

DANNY MAIDEN, PLAINTIFF,

v. **MEMORANDUM OPINION AND ORDER**
(Filed Oct. 27, 2003)

NORTH AMERICAN STAINLESS, L.P.
ET. AL., DEFENDANTS.

* * *

The plaintiff has moved the Court to remand the above-styled action to the Carroll Circuit Court [Record No. 3]. Defendant has responded [Record No. 5] to which Plaintiff has replied [Record No. 7]. Fully briefed, this matter is now ripe for decision.

FACTUAL BACKGROUND

North American Stainless, L.P. ("NAS"), owns and operates a stainless steel manufacturing facility in Carroll County, Kentucky. Plaintiff is a former at-will employee of NAS. In his complaint, Plaintiff states that on or about August 29, 2002, NAS, acting through Defendant Steve Shaver ("Shaver") and others, discharged him. In Count One, Plaintiff alleges that he was wrongfully terminated in retaliation for cooperating with the Carroll County Sheriff in a stolen property investigation. In Count Two, Plaintiff alleges that NAS and Shaver, as NAS' agent, improperly and maliciously interfered with Plaintiff's prospective business and employment relations. Count Three merely asserts that NAS is liable for Shaver's conduct under Counts One and Two due to their agency

relationship. Count Four demands punitive damages for the claims asserted in Counts One and Two. Plaintiff filed this civil action in Carroll Circuit Court on August 19, 2003, seeking damages, both compensatory and punitive, for the alleged wrongs complained of. The case was removed to this Court on September 8, 2003, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Plaintiff now moves the Court to remand this action to state court on the grounds that there is want of complete diversity among the parties. Essentially, Plaintiff is arguing that this Court lacks subject matter jurisdiction to hear the above captioned case. The Court disagrees.

ANALYSIS

28 U.S.C. § 1441(b) provides that:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if *none of the parties in interest properly joined and served as defendants is a citizens* [sic] *of the State in which such action is brought.*

28 U.S.C. § 1441(b) (emphasis added). Plaintiff argues that removal of this action was not proper as there is not complete diversity of the parties as required by § 1441 and, as a result, this Court does not have subject matter jurisdiction. Specifically, he points out that he is a citizen of the Commonwealth of Kentucky and alleges that one of the defendants, Steve Shaver, is also a citizen and resident of the Commonwealth.

In assessing a motion to remand, this Court must first determine whether the action was properly removed. *See Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996). When, as here, the action was removed based upon diversity jurisdiction, complete diversity of citizenship between Plaintiff and Defendants must exist at the time of removal. *Coyne v. American Tobacco Co.*, 183 F.3d 488, 492 (6th Cir. 1999). In this regard, a party "seeking to bring a case into federal court carries the burden of establishing diversity jurisdiction." *Certain Interested Underwriters at Lloyd's of London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994).

It is well settled that a plaintiff may not confer or divest federal jurisdiction "by plaintiff's own determination as to who are proper plaintiffs and defendants to the action. *Rose v. Giamatti*, 721 F.Supp. 906, 913 (S.D. Ohio 1989). Accordingly, this Court recognizes that fraudulent joinder of a non-diverse defendant does not defeat removal based upon diversity jurisdiction. *Coyne*, 183 F.3d at 493; *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). To prove fraudulent joinder, the removing party must present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law. *See Alexander,* 13 F.3d at 949. Under the doctrine of fraudulent joinder, the inquiry is whether Plaintiff had at least a colorable cause of action against the non-diverse defendant. If there is a colorable basis for predicting that a plaintiff may recover against a non-diverse defendant, this Court must remand the action to state court. The district court must resolve "all disputed questions of fact and ambiguities in the controlling . . . state law in favor of the non-removing party." *Id.* All

doubts as to the propriety of removal are resolved in favor of remand. *Id.*

Upon examination of the record, the Court concludes that Plaintiff can not establish a cause of action against the non-diverse Defendant, Shaver, under state law, thereby permitting removal of this action to the federal court. As Defendants correctly point out, Maiden did not seek any relief directly from Shaver. In Count One of his complaint, Plaintiff specifically states that, " . . . Plaintiff has incurred lost past wages, and loss of future income . . . for all of which Plaintiff is entitled to be compensated by NAS." (Complaint ¶ 15). Moreover, in Count Three Plaintiff unequivocally states that, since Defendant NAS was acting through its agents, including Steve Shaver, " . . . NAS either authorized or ratified, or should have anticipated and taken steps to prevent, the misconduct of its agent(s) . . . therefore their [the agent's] liability for the Plaintiff's damages . . . is imputable to NAS." (Complaint ¶ 25).

Moreover, it is the Court's determination that Maiden ultimately would be unable to state a cause of action against Shaver, as he is merely an agent of Defendant NAS. As an agent of NAS, Shaver did nothing other than act in his official capacity. Indeed, it has not been alleged that Shaver did anything wrongful except execute the allegedly wrongful act of the corporate defendant. The alleged wrongs of which Plaintiff complains are all corporate wrongs. Plaintiff does not and apparently can not allege that the individual defendant owed him any duty in his individual capacity, nor that he did any act in his individual capacity which violated any such duty or otherwise caused plaintiff harm except as a result of corporate acts.

CONCLUSION

For the foregoing reasons, it is the Court's determination that Shaver was in fact fraudulently joined because, first, Plaintiff's complaint does not state a cause of action against him and, second, Plaintiff is unable to state any cause of action against him. Accordingly,

IT IS ORDERED that Plaintiff's motion to remand [Record No. 3] be, and the same hereby is, **DENIED.**

This the 27th day of October, 2003.

[LOGO] Signed By:

Joseph M. Hood JMH
United States District Judge

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 03-59-JMH

DANNY MAIDEN, PLAINTIFF,

v.

ORDER

NORTH AMERICAN STAINLESS, L.P., et al., (Filed Nov. 25, 2003) DEFENDANT.

* * * * * * * * * * * * * * *

This matter is before the Court on Plaintiff's motion to alter, amend or vacate this Court's October 27, 2003, Order denying remand due to the fraudulent joinder of Defendant, Steve Shaver [Record No. 9]. Defendant, North American Stainless, L.P. has responded [Record No. 10], to which Plaintiff has replied [Record No. 11]. This matter is now ripe for a decision.

The purpose of a Fed. R. Civ. P. 59(e) motion is to enable a Court to correct manifest errors of law or fact or to consider the importance of newly discovered evidence. *See Helton v. ACS Group*, 964 F.Supp. 1175, 1182 (W.D. Ky. 1997). A party should not file said motion for the purpose of relitigating issues already presented before the Court. *See Id.* at 1182. The law is clear in that Fed. R. Civ. P. 59 is not intended to allow a party to "rehash" old arguments. *Id.* The Court will grant relief for said motion under the following circumstances: "(1) An intervening change of controlling law; (2) Evidence not previously available has become available; or (3) It is necessary to correct a clear error of law or prevent manifest injustice." *Id.*

Upon reviewing Plaintiff's initial grounds to alter, vacate, or amend the judgment under Fed. R. Civ. P. 59(e),

the Court notes that the plaintiff has not made any allegations regarding a change in the controlling law for this case. In addition, the plaintiff has not come forth with any new evidence that would impact the outcome of this Court's fraudulent joinder determination. Finally, the Order denying remand did not contain any clear errors of law.

Accordingly,

IT IS ORDERED that Plaintiff's motion to alter, amend or vacate this Court's October 27, 2003, Order [Record No. 9] be, and the same hereby is, **DENIED**.

This the 25th day of November, 2003.

Signed By:

[SEAL] /s/ Joseph M. Hood (JMH)
United States District Judge

No. 04-5443

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANNY L. MAIDEN, Plaintiff-Appellant, v. NORTH AMERICAN STAINLESS, ET AL., Defendants-Appellees.	)	ORDER (Filed Mar. 30, 2006)

BEFORE: GILMAN and COOK, Circuit Judges; and MILLS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk
[Illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 03-59-JMH

DANNY MAIDEN, PLAINTIFF,

v.

ORDER

(Filed Sep. 30, 2003)

NORTH AMERICAN STAINLESS, L.P., et al., DEFENDANTS.

* * * * * * * * *

This action is before the Court on the plaintiff's motion to hold the defendants' dispositive motion in abeyance until the plaintiff's motion for remand to state court is decided by this court [Record No. 4]. The Court having considered the plaintiff's unopposed motion, and being otherwise sufficiently advised,

IT IS ORDERED:

(1) That the plaintiff's unopposed motion to hold the defendants' dispositive motion in abeyance until the plaintiff's motion for remand to state court is decided by this Court [Record No. 4] be, and the same hereby is, **GRANTED**;

(2) that the defendants' motion to dismiss [Record No. 2] be, and the same hereby is, **HELD IN ABEYANCE**, until this Court rules on the plaintiff's motion to remand; and

(3) that the plaintiff is allowed twenty days (20) from the date of this Court's order on plaintiff's motion to remand, to file any necessary response to the defendant's dispositive motion.

This the 30th day of September, 2003.

Signed By:

[SEAL] /s/ Joseph M. Hood (JMH)
United States District Judge

NO. **CARROLL CIRCUIT COURT**
CIVIL DIVISION NO.

DANNY L. MAIDEN, **PLAINTIFF**
an individual

v. **COMPLAINT**

(Filed Aug. 19, 2003)

NORTH AMERICAN STAINLESS, L. P.
an [sic] foreign limited partnership
6870 Highway 42 East,
Ghent, KY. 41045

Serve: William H. Jones, Jr.
1544 Winchester Ave., 5th Fl.
Ashland, Ky. 41101

and

STEVE SHAVER,
an individual, individually, and
as agent of **NORTH AMERICAN STAINLESS, L. P.**
6870 Highway 42 East
Ghent, Ky. 41045

DEFENDANTS

* * * * * * * * * * * * * *

COMES THE PLAINTIFF, Danny L. Maiden, and for his complaint against the Defendants respectfully states as follows:

GENERAL ALLEGATIONS

1. That the Plaintiff is, and was at all times relevant hereto, a citizen and resident of Carrollton, Carroll County, Kentucky.

2. That the Defendant **NORTH AMERICAN STAINLESS, L.P.**, ("NAS") is and was at all times relevant hereto, an [sic] foreign limited partnership, organized and existing under the laws of Delaware, and conducting business in Carroll County, Kentucky; and was in all matters relevant hereto, acting by and through its agents, contractors, managers, borrowed servants, employees, servants, and other ("agents"), and upon information and belief, employed at least eight (8) or more employees in this Commonwealth in addition to the Plaintiff, in each of the calendar years ending 2000, 2001, and 2002.

3. That the Defendant Steve Shaver, is and was at all times relevant hereto, an individual, and a citizen and resident of Ghent, Carrol [sic] County, Kentucky, and was acting individually, and also he was acting in his capacity as agent of NAS.

4. That the amount in controversy herein exceeds the minimum jurisdictional limit of this honorable Court.

COUNT ONE

5. That the Plaintiff hereby reavers and realleges paragraphs 1-4 hereof as if copied herein verbatim.

6. That on and prior to August 29, 2002 NAS employed the Plaintiff in an at-will employer/employee relationship; such that NAS was the employer, and the Plaintiff was its employee.

7. That on and prior to August 29, 2002 the Plaintiff was an employee of NAS in good standing.

8. That on or about July 15, 2002, in the Commonwealth of Kentucky, Carroll County, while performing his

duties as an employee of NAS, the Plaintiff cooperated with the lawful authority of the Carrol [sic] County Sheriff's department, and identified to the Sheriff certain personal property being sought by the Sheriff as stolen property ("stolen property")

9. That the stolen property was in the possession of, and was being used by NAS, at the time Plaintiff identified it to the Sheriff; and subsequently the NAS employee responsible for bringing it to NAS was convicted of the felony of receiving the stolen property.

10. That NAS warned Plaintiff that he would be sorry that he ever dared to cooperate with the Sheriff in recovering the stolen property.

11. That on or about August 29, 2002 acting through the Defendant Steve Shaver and others, the Plaintiff was discharged from his employment with NAS.

12. That the discharge complained of herein was substantially motivated by retaliation on the part of NAS and Steve Shaver, and against this Plaintiff for Plaintiff having lawfully cooperated with the Sheriff in recovery of the stolen property.

13. That the Plaintiff had solemn duties and rights to cooperate with the enforcement of the criminal laws of this Commonwealth, and those rights are established and protected by the constitutions, by specific statutes, and also by the well-established public policy of the COMMONWEALTH OF KENTUCKY, and these UNITED STATES.

14. That therefore the Plaintiff's discharge in retaliation for his exercise of these rights, or any of them, constitutes a wrongful discharge of his employment with NAS according the laws of this Commonwealth.

15. That as a direct result of the discharge and other conduct complained of herein, the Plaintiff has incurred lost past wages, and loss of future income, he has experienced physical anguish and emotional distress, and, it is likely that this Plaintiff will continue to suffer physical anguish and emotional distress and to incur loss of income in the future; for all of which Plaintiff is entitled to be compensated by NAS.

COUNT TWO

16. That the Plaintiff hereby reavers and realleges paragraphs 1-15 hereof as if copied herein verbatim.

17. That subsequent to his discharge complained of herein, acting by and through the Defendant Steve Shaver and others, NAS began a series of wrongful steps to maliciously interfere with Plaintiff's expectancy of prospective business and employment relations by, and between this Plaintiff, and other businesses and employers in the Carrollton area.

18. That Plaintiff had the expectancy of many valid business and employment relations after his discharge from NAS.

19. That NAS and Shaver had knowledge of the Plaintiff's expectancy of these valid business and employment relations.

20. That acting by and through Steve Shaver and others, NAS engaged in intentional acts of interference and obstruction of the Plaintiff's expectancy of these many valid business and employment relations after his discharge from NAS, with malice and with the improper

motive of further punishing and retaliating against the Plaintiff.

That as a direct result of NAS' intentional acts of interference and obstruction, this Plaintiff was stigmatized and he was damaged as complained of hereinabove.

COUNT THREE

22. That the Plaintiff hereby reavers and realleges paragraphs 1-21 hereof as if copied herein verbatim.

23. That this Plaintiff had constitutionally and statutorily protected rights, and, further he had rights explicit and implicit in the well-established public policy of this Commonwealth and these United States, to be free from retaliation by his employer and its agents of the kinds complained of herein.

24. That while engaging in the retaliatory misconduct complained of herein, the Defendant NAS was acting by and through its actual, apparent, or ostensible agent(s), including the Defendant Steve Shaver, in the furtherance of its business and economic interests, and within the course and scope of their employment with NAS.

25. That NAS either authorized or ratified, or should have anticipated and taken steps to prevent, the misconduct of its agent(s) complained of herein; therefore their liability for the Plaintiff's damages complained of herein, including liability for exemplary damages, is imputable to NAS.

26. That the Defendant NAS is therefore liable to the Plaintiff for his compensatory damages complained of

herein, and also for exemplary damages according to the laws and public policy of this Commonwealth.

COUNT FOUR

27. That the Plaintiff hereby reavers and realleges paragraphs 1-26 hereof as if copied herein verbatim.

28. That the conduct and misconduct of NAS and its agents complained of herein constitutes intentional, wanton, oppressive, and/or malicious conduct; thus entitling Plaintiff to recover his compensatory damages and also exemplary damages according to the laws of this Commonwealth.

29. That the conduct and misconduct of NAS and its agents complained of herein constitutes a reckless disregard for the property of the Plaintiff, thus entitling Plaintiff to recover his compensatory damages and also exemplary damages according to the common law of this Commonwealth.

WHEREFORE, the Plaintiff respectfully demands as follows:

1. Trial by jury on all issues so triable.

2. Judgment in favor of the Plaintiff and against the Defendants NAS and Steve Shaver, for his compensatory damages complained of herein, both general and special, liquidated and unliquidated as the proof at trial should demonstrate.

3. Judgment in favor of the Plaintiff for punitive damages against the Defendant NAS and Steve Shaver; to punish these Defendants, and to deter these Defendants

and others in the future from that conduct complained of herein and conduct of the kind complained of herein.

4. Leave of this Honorable Court to amend his pleadings to conform to the evidence and so as to do substantial justice.

5. For his costs herein expended, including a reasonable fee for her [sic] attorneys pursuant to the civil rights and other laws of this Commonwealth and these United States.

6. For any and all other proper relief to which he should now or hereafter appear to be entitled, whether in law or equity.

RESPECTFULLY SUBMITTED BY:

/s/ [Illegible]
JACQUELINE K. SCHROERING
HARRY L. GREGORY, III
Attorneys for Plaintiff
714 Lyndon Lane, Suite #3
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THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

DANNY MAIDEN **PLAINTIFF**

V. **CIVIL ACTION NO. 3:03 CV-59 JMH**

STEVE SHAVER, ET AL **DEFENDANTS**

* * * * * * * * * * * * * * *

PLAINTIFF'S AFFIDAVIT

Comes the Affiant, Danny Maiden, the Plaintiff herein, and after being first duly sworn and advised of the penalties of perjury, states as follows:

1.) That affiant is the Plaintiff in the above action and was an employee of North American Stainless ("NAS") before being discharged on or about August 29, 2002.

2.) That the Defendant Steve Shaver was a manager or director with NAS and he personally engaged in the conduct described in affiant's complaint and in more detail as follows.

3.) That beginning in the spring of 2002 while affiant was an employee of NAS, affiant was required to operate, and he did operate a certain large piece of construction equipment, a Caterpillar model #312 Trackhoe ("stolen property") and soon later affiant learned that another employee of NAS one Timothy Allen Miller had brought the stolen property to NAS and that Miller knew it was stolen property.

4. That affiant was very much in fear of being punished for his involvement with the stolen property; in July of 2002 the Carroll County sheriff came to NAS and

point blank asked affiant if he knew where was the stolen property and that he must tell if he knew about it; and affiant cooperated with the sheriff in recovering it.

5. That after the stolen property was recovered and just before Timothy Allen Miller was convicted of receiving it [Exhibit "2", Miller's indictment dated August 12, 2002, and his conviction in Carroll Circuit Court dated November 4, 2002], Steve Shaver told affiant he would regret that he had cooperated with the sheriff in recovering the stolen property.

6. That Steve Shaver decided to discharge the affiant in retaliation for his cooperation with the recovery of the stolen property, and affiant says that but for his cooperation with the recovery of the stolen property Shaver would not have discharged him.

7. That after affiant's discharge from employment with NAS, NAS maliciously tried to keep me from getting any work by wrongfully interfering with my prospective employment opportunities as follows.

8. That upon affiant's information and belief, NAS used unlawful means to keep affiant from getting work including the following actions: Steve Shaver and others coerced prospective employers of affiant's not to hire affiant by using fraud and deceit, including but not limited to M & M Towing of Prestonville, Ky., Davis & Burton Const. Co. of West Virginia, and Systems Construction from Arkansas ("prospective employers"), by falsely and fraudulently threatening to sever relations between those prospective employers and NAS, when Shaver knew that NAS would not sever relations with those prospective employers even if they hired affiant; affiant believes Shaver did this in Carroll County Kentucky, on and

following affiant's discharge on August 29, 2003, in order to cause affiant cruel and unjust hardship and thereby affecting affiant's livelihood and personal well being.

9. That NAS used the additional unlawful means to keep affiant from getting work including the following actions: Steve Shaver and others caused to be posted in conspicuous places in Carroll County certain "Wanted Poster" type postings, depicting the image of the affiant, and advising and representing to persons who saw the "Wanted Poster" that affiant was wanted for arrest and that affiant should and would be arrested if seen; when Shaver and others had no reason to believe that affiant was wanted for arrest or that affiant should or would be arrested for any reason.

10. That affiant expects to prove these things at trial and to learn through discovery in this action, other malicious acts done by NAS and Shaver designed to retaliate against him for his exercise of lawful rights and in reckless disregard for those rights.

Further affiant says not.

/s/ Danny L. Maiden
Danny L. Maiden, Affiant

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Danny L Maiden, to me personally known, on this 3d day of October, 2003.

My commission expires: February 21, 2006

/s/ [Illegible]
Notary Public State at Large, Ky.